92-1453

No. _____

Supreme Court, U.S.
FILED
MAR 2 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

Cross-Petitioners,

v.

CHARLES J. REICH,

Cross-Respondent.

Cross-Petition For Writ Of Certiorari To The Supreme Court of Georgia

CROSS-PETITION FOR WRIT OF CERTIORARI

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for Cross-Petitioners)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Cross-Petitioners

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), invalidating income tax statutes in Michigan which taxed federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, applies retroactively, as a federal choice-of-law matter, to periods before *Davis* was announced.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CITATION TO OPINION BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Chevron Oil v. Huson, 404 U.S. 97 (1971) 4

Davis v. Michigan, 489 U.S. 803 (1989) 1, 2, 3, 4, 5

Harper v. Virginia Dep't of Taxation, No. 91-794 ... 1, 5, 6

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 4

STATUTES

4 U.S.C. § 111 ..... 2, 3

28 U.S.C. § 1257(a) 2

O.C.G.A. § 5-6-35(a) 4

O.C.G.A. § 48-2-35 ..... 3, 4

O.C.G.A. § 48-7-27(a)(4) (1982) 3

O.C.G.A. § 48-7-27(a)(5) (Supp. 1992) 3

OTHER AUTHORITIES

U.S. Sup. Ct. Rule 12.3 2

U.S. Sup. Ct. Rule 13.4 2

No. _____

In The

Supreme Court of the United States

October Term, 1992

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

Cross-Petitioners,

v.

CHARLES J. REICH,

Cross-Respondent.

Cross-Petition For Writ Of Certiorari To The Supreme Court of Georgia

CROSS-PETITION FOR WRIT OF CERTIORARI

This cross-petition for writ of certiorari has been filed in order to preserve for review that portion of the Georgia Supreme Court's opinion which held that *Davis v. Michigan*, 489 U.S. 803 (1989), applies retroactively, as a federal choice-of-law matter, to periods before *Davis* was announced. The same issue is now before this Court in *Harper v. Virginia Dep't of Taxation*, No. 91-794.

CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court is officially reported at 262 Ga. 625 (1992), and is unofficially

reported at 422 S.E.2d 846 (1992). A copy of the court's opinion is also attached as Appendix A to the Petition for Writ of Certiorari filed by Charles J. Reich, which has been docketed as Case No. 92-1276.

STATEMENT OF JURISDICTION

The decision of the Georgia Supreme Court was entered on November 19, 1992. Cross-Petitioners' motion for reconsideration of that portion of the court's opinion concerning the retroactive application of *Davis* was denied on December 17, 1992. On January 29, 1993, Charles J. Reich filed his petition for writ of certiorari, which has been docketed as Case No. 92-1276, seeking to review other portions of the Georgia Supreme Court's opinion. This cross-petition is filed within the time allowed by law, *see* U.S. Sup. Ct. Rule 13.4, without regard to the provisions of U.S. Sup. Ct. Rule 12.3, and jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AT ISSUE

(1) 4 U.S.C. § 111:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the

taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

(2) O.C.G.A. § 48-7-27(a)(4) (1982) (Appendix A)

STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, *see* O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. *See* O.C.G.A. § 48-7-27(a)(5) (Supp. 1992).

Shortly after *Davis* was announced, Cross-Respondent Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Department of Revenue for Georgia income taxes which he had voluntarily paid on his military retirement benefits for the years 1985 through 1988. When the Department denied his claims, the taxpayer brought suit under O.C.G.A. § 48-2-35, contending

that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to the U.S. Constitution, and comparable provisions of the Georgia Constitution. Among other grounds, Cross-Petitioners defended on the basis that *Davis* did not apply retroactively to years before *Davis* was announced. Both the Cross-Petitioners and the taxpayer subsequently filed motions for summary judgment.

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. (Petition for Writ of Certiorari, No. 92-1276, Appendix C.) However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Colonel Reich's application for discretionary appeal. *See* O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35, which provides for refunds of taxes "erroneously or illegally assessed and collected", did not apply to taxes paid under a law later held unconstitutional, and that Colonel Reich was therefore not entitled under that statute to the refunds he sought. Cross-Petitioners' motion for reconsideration of that portion of the court's opinion concerning the retroactive application of

Davis was denied on December 17, 1992. (Appendix B hereto, and Petition for Writ of Certiorari, No. 92-1276, Appendix B.)

ARGUMENT

This cross-petition for writ of certiorari has been filed in order to preserve for review that portion of the Georgia Supreme Court's opinion which held that *Davis v. Michigan,* 489 U.S. 803 (1989), applies retroactively, as a federal choice-of-law matter, to periods before *Davis* was announced. This Court is expected to definitely answer this question in *Harper v. Virginia Dep't of Taxation,* No. 91-794. The instant cross-petition should be held pending the decision in *Harper.* If the Court determines in *Harper* that *Davis* does not apply retroactively in the manner urged by the taxpayer, and as held by the Georgia Supreme Court, Cross-Petitioners submit that their cross-petition should be granted, and that the Court should summarily reverse and remand.

CONCLUSION

Cross-Petitioners respectfully request that the instant cross-petition for writ of certiorari be held pending this Court's decision in *Harper,* with the disposition of the cross-petition to depend on the final outcome in *Harper.*

Respectfully submitted,

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for Cross-Petitioners)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Cross-Petitioners

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370

APPENDIX A

48-7-27. Taxable net income; method of computation; deductions; deduction of income received from certain public pension or retirement funds or systems; addition of certain dividend or interest income; disallowance of certain deductions and losses; nonrecognition of gains or losses on sale or exchange of property; validity of other exemptions; elections.

(a) Georgia taxable net income of an individual shall be the taxpayer's federal adjusted gross income, as defined in the United States Internal Revenue Code of 1954, less:

(1) Either the sum of all itemized nonbusiness deductions if the taxpayer used itemized nonbusiness deductions in computing federal taxable income or, if the taxpayer could not or did not itemize nonbusiness deductions, then the standard deduction allowed under United States Internal Revenue Code of 1954 in force and effect on January 1, 1974. For tax years beginning on or after January 1, 1983, there shall be subtracted either the sum of all itemized nonbusiness deductions, if the taxpayer used itemized nonbusiness deductions in computing federal taxable income, or, if the taxpayer could not or did not itemize nonbusiness deductions, a standard deduction as provided for in the following subparagraphs:

(A) In the case of a single taxpayer or a head of household, 15 percent of the taxpayer's adjusted gross income, but not more than $2,300.00 and not less than $1,500.00;

(B) In the case of a married taxpayer filing a separate return, 18 percent of the taxpayer's adjusted gross income, but not more than $1,500.00 and not less than $850.00; or

(C) In the case of a married couple filing a joint return, 18 percent of the taxpayer's adjusted gross income, but not more than $3,000.00 and not less than $1,700.00;

(2) The exemptions provided for in Code Section 48-7-26 together with the adjustments provided for in subsection (b) of this Code section;

(3) The amount of salary and wage expenses eliminated in computing the individual's federal adjusted gross income because the individual has taken a federal jobs tax credit which requires, as a condition to using the federal jobs tax credit, the elimination of related salary and wage expenses;

(4)(A) Income received from the following, and only the following, public pension or retirement funds or systems when the income is otherwise included in the taxpayer's federal adjusted gross income:

(i) Employees' Retirement System of Georgia;

(ii) Georgia Firemen's Pension Fund and all local firemen's pension funds;

(iii) Peace Officers' Annuity and Benefit Fund of Georgia;

(iv) Trial Judges and Solicitors Retirement Fund;

(v) Superior Court Clerks' Retirement Fund of Georgia;

(vi) Public School Employees Retirement System;

(vii) Georgia Legislative Retirement System;

(viii) Teachers Retirement System of Georgia and all local teachers' retirement systems;

(ix) Teachers' retirement systems or funds of states having a reciprocal agreement with this state to exempt income from the Teachers Retirement System of Georgia from taxation;

(x) Funds, programs, or systems the income from which is exempted by federal law or treaty;

(xi) Superior Court Judges Retirement System; and

(xii) District Attorneys' Retirement System;

(B) It is the intent of the General Assembly that no income from a public pension or retirement fund, program, or system shall be exempt from income taxation in this state unless the exemption is provided for in this paragraph or unless the law granting the exemption makes specific reference to this paragraph;

(5)(A) Retirement income not to exceed $2,000.00 per year received from any source. This paragraph shall not apply to or affect retirement income which is already wholly

exempt from income taxation because it is received from a public pension or retirement fund or system listed in subparagraph (4)(A) of this subsection. A taxpayer shall be eligible for the $2,000.00 exclusion granted by this paragraph only if he:

(i) Is 62 years of age or older during any part of the taxable year; or

(ii) Is permanently and totally disabled in that he has a medically demonstrable disability which is permanent and which renders him incapable of performing any gainful occupation within his competence.

(B) The commissioner shall by regulation require proof of the eligibility of the taxpayer for the exclusion allowed by this paragraph.

(b)(1) There shall be added to the taxable income:

(A) Dividend or interest income, to the extent that the dividend or interest income is not included in gross income for federal income tax purposes, on obligations of any state except this state or of political subdivisions except political subdivisions of this state; and

(B) Interest or dividends on obligations of the United States or of any authority, commission, instrumentality, territory, or possession of the United States which by the laws of the United States are exempt from federal income taxes but not from state income taxes.

(2) There shall be subtracted from taxable income interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States. Any amount subtracted under this paragraph shall be reduced by any expenses directly attributable to the production of the interest or dividend income.

(3) There shall be added to taxable income any income taxes imposed by any tax jurisdiction to the extent deducted in determining federal taxable income.

(4) No portion of any deductions or losses including, but not limited to, net operating losses, which occurred in a year in which the taxpayer was not subject to taxation in this state, may be deducted in any tax year. When federal adjusted gross income includes deductions or losses not allowed pursuant to this paragraph, an adjustment deleting them shall be made under rules established by the commissioner. Losses incurred prior to January 1, 1971, shall be deductible only to the extent allowed by law at the time they were incurred; and the commissioner shall provide rules to preserve the deductibility of losses incurred prior to January 1, 1971, to the extent that the losses would have been deductible as net operating loss carryovers for a taxable year or years beginning on or after January 1, 1971, if Ga. L. 1931, Ex. Sess., p. 24, Section 11 (as amended by Ga. L. 1952, p. 405, Section 10-A; Ga. L. 1953, Jan.-Feb. Sess., p. 279,

Sections 1-3; Ga. L. 1953, Nov.-Dec. Sess., p. 316, Section 1; and Ga. L. 1961, p. 565, Section 3; repealed by Ga. L. 1971, p. 605, Section 6) had continued in effect after January 1, 1971.

(5) Income, losses, and deductions previously used in computing Georgia taxable income shall not again be used in computing Georgia taxable income; and the commissioner shall provide for needed adjustments by regulation.

(6) When, on the sale or exchange of real or tangible personal property located in this state, gain or loss is not recognized because the taxpayer receives or purchases similar property, the nonrecognition shall be allowed only when the property is replaced with property located in this state.

(7) Except as otherwise provided in paragraph (4) of subsection (a) of this Code section, this chapter shall not be construed to repeal any tax exemptions contained in other laws of this state not referred to in this Code section. Those exemptions and the exemptions provided by federal law and treaty shall be deducted on forms provided by the commissioner.

(8) All elections made by the taxpayer under the Internal Revenue Code of 1954 shall also apply under this article. (Code 1933, § 92-3107, enacted by Ga. L. 1971, p. 605 § 4; Ga. L. 1975, p. 843, § 1; Ga. L. 1978, p. 1456, § 1; Ga. L. 1979, p. 888, § 2; Code 1933, § 91A-3607, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1979, p. 5, § 67; Ga. L. 1979, p. 888, § 4; Ga. L. 1980, p. 10, §§ 17, 18; Ga. L. 1981, p. 1857, §§ 35, 36; Ga. L. 1981, p. 1903, §§ 3, 4; Ga. L. 1982, p. 3, § 48.)

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

CHARLES J. REICH, Appellant, v. MARCUS E. COLLINS, SR., Individually and in his capacity as Georgia State Revenue Commissioner, and the GEORGIA DEPARTMENT OF REVENUE, Appellees.	*	CASE NOS. S92A0621 and S92A0622

MOTION FOR RECONSIDERATION

Appellees Marcus E. Collins, Sr., State Revenue Commissioner, and the Georgia Department of Revenue (collectively "the State") respectfully move, pursuant to Rule 47 of the Georgia Supreme Court, for reconsideration of Division 1 of the Court's November 19, 1992 opinion (copy attached), holding that the U.S. Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) applies retroactively to tax years before *Davis* was announced.

In Division 1 of its opinion, the Court concludes that the federal choice-of-law question must be decided by reference to *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), rather than under the three-part test prescribed by *Chevron Oil v. Huson*, 404 U.S. 97 (1971), and must be decided in Colonel Reich's favor, because "the [U.S. Supreme] Court applied its decision [in *Davis* retroactively] to the taxpayer before it. " In *Davis*, Michigan had previously agreed to pay Mr. Davis a refund if

Michigan's statutes were found to violate federal law. The State respectfully submits that, given this concession, the retroactive application of the Supreme Court's decision in *Davis* to the taxpayer in that case was not at issue. *See, e.g., Sheehy v. State,* 820 P.2d 1257, 1259 (Mont. 1991) ("Because of that concession, the Court did not consider the issue of whether retroactive application should be granted.") However, the Court concludes here that Michigan conceded only the remedy which Mr. Davis would receive if Michigan's statutes were retroactively invalidated, since "[i]t does not follow that if the Supreme Court had determined that its decision in *Davis* was to be prospective only . . . that the State of Michigan would have conceded the taxpayer was due a refund." In fact, "[a] State is free . . . to provide broader relief as a matter of state law than is required by the Federal Constitution," *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 52 n.36 (1990), and the question of retroactivity may be irrelevant under the tax statutes of the particular state. *See, e.g., Hackman v. Missouri,* 771 S.W.2d 77, 81 (Mo. 1989), *cert. denied,* 493 U.S. 1019 (1990) ("[W]e hold that by its adoption of Section 143.801, the State of Missouri has consented to a refund of any overpayment . . . of income tax. . . . Having so concluded, there is no need to consider whether *Davis* should be applied retroactively or only prospectively . . . . ") There is nothing in the *Davis* opinion itself or the record of that case to indicate that Michigan's concession was conditioned on a retroactive holding of unconstitutionality.

In its November 19 opinion, the Court also states that the U.S. Supreme Court itself, in *Barker v. Kansas,* 112 S. Ct. 1619 (1992), has already applied *Davis* retroactively. In

Barker, the U.S. Supreme Court rejected the argument that military retired pay is "significantly different" from other retirement income, within the meaning of *Davis,* reversed the contrary holding of the Kansas Supreme Court, and remanded "for further proceedings not inconsistent with this opinion." 112 S. Ct. at 1626. Because "[t]he [U.S. Supreme] Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid", the Court finds here that *Davis* was applied retroactively to the litigants in *Barker.* However, the taxpayers in *Barker* had sought not only refunds, but also a declaratory judgment regarding the validity of Kansas' statutes (which were still in effect) and an injunction prohibiting future assessments against military retirees under the challenged law. 112 S. Ct. at 1622. The Kansas Supreme Court can still, consistent with the U.S. Supreme Court's opinion in *Barker,* hold that *Davis* applies prospectively only and that the taxpayers are entitled to declaratory judgment and an injunction but no refunds. The *Barker* decision does not suggest or imply that *Davis* must be applied in any other fashion.

For the reasons set out above, the State respectfully moves that the Court reconsider Division 1 of its November 19 opinion.

This 30th day of November, 1992.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Daniel M. Formby
DANIEL M. FORMBY 269350
Senior Assistant Attorney General

/s/ Warren R. Calvert
WARREN R. CALVERT
105341
Senior Assistant Attorney General

PLEASE SERVE ALL
COMMUNICATIONS UPON:

WARREN R. CALVERT
Senior Assistant
Attorney General
40 Capitol Square, Suite 132
Atlanta, Georgia 30334
(404) 656-3370

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing MOTION FOR RECONSIDERATION upon:

Carlton M. Henson
McAlpin & Henson
11 Piedmont Ctr., Ste 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305

by placing the same into the United States mail with adequate first class postage placed thereon.

This 30th day of November, 1992.

/s/ Warren R. Calvert
WARREN R. CALVERT
Senior Assistant Attorney General

Supreme Court, U.S.
FILED
MAY 5 1993
OFFICE OF THE CLERK

No. 92-1453

In The

Supreme Court of the United States

October Term, 1992

MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,

Cross-Petitioners,

v.

CHARLES J. REICH,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

CARLTON M. HENSON
Counsel of Record

McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road
Atlanta, GA 30305
(404) 239-0774

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether 4 U.S.C. § 111 was law before *Davis v. Michigan*, 489 U.S. 803 (1989).

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Citations to Opinion Below 2

Statement of the Case 3

Argument 6

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

American Trucking Co. Ass'ns v. Smith, 496 U.S. 167, 110 S.Ct. 2323 (1990) 9

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049 (1984) 6, 7, 8

Bass v. South Carolina, No. 91-1697 2

James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 111 S. Ct. 2439 (1991) 1, 3, 5, 6, 7, 8

Bohn v. Waddell, No. 92-1748 2

Chevron Oil v. Huson, 404 U.S. 97 (1971) 5, 9

Clark v. United States, 691 F.2d 837 (7th Cir. 1982) 9

Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 109 S. Ct. 1500 (1989) ..... *passim*

Duffy v. Wetzler, No. 92-521 3

Harper v. Virginia Dept. of Taxation, No. 91-794, *cert. granted*, ___ U.S. ___, 112 S.Ct. 1934 (1992) 3, 4

Hogan v. Wis. Dept. of Revenue, Wis. Tax App. Commission, Docket No. 91-1-386, Statement of Commissioner Douglas H. Bartley (April 8, 1993) 2

Iowa-Des Moines Bank v. Bennett, 284 U.S. 239, 52 S. Ct. 133 (1931) 6

Kizas v. Webster, 707 F.2d 524 (D.C. Cir. 1983) *cert. denied*, 464 U.S. 1042 9

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990) 3

TABLE OF AUTHORITIES – Continued

Page

Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 103 S. Ct. 692 (1983) 9

Northwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue, No. 91-2047 2

Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 80 S. Ct. 474 (1960) 9

Pledger v. Bosnick, No. 91-375 3

Sheehy v. Montana Dept. of Revenue, No. 91-1473 3

Swanson v. North Carolina, No. 91-1436 3

Waldron v. Collins, 788 F.2d 736 (11th Cir. 1986) 4

Woosley v. California, No. 92-1605 2

Zucker v. U.S., 758 F.2d 637 (Fed. Cir.) *cert. denied*, 474 U.S. 842 (1985) 9

OTHER AUTHORITIES

1931 Ga. Laws 24 2

O.C.G.A. § 48-7-27 3

4 U.S.C. § 111 ..... 1, 4, 8, 9, 10

No. 92-1453

In The

Supreme Court of the United States

October Term, 1992

MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,

Cross-Petitioners,

v.

CHARLES J. REICH,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Respondent in the above-styled action opposes the Cross-Petition for Writ of Certiorari to the Supreme Court of Georgia. The Georgia Supreme Court was correct in applying *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 109 S. Ct. 1500 (1989), retroactively. The litigant in *Davis* received retroactive relief, and *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S. Ct. 2439 (1991), requires that Cross-Respondent receive equal treatment. Further, *Davis* raises no issue of retroactivity because 4 U.S.C. § 111 has been law since 1939. A grant of certiorari to the State would only further delay resolution

of the ultimate issue in these tax cases, that is, whether citizens who paid illegal taxes will recover refunds.[1]

CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court is reported at 262 Ga. 625, 422 S.E.2d 846 (1992). The full text of this opinion is included as Appendix A to the Petition for Writ of Certiorari.

---

[1] This Court has witnessed only the beginning of the shenanigans the states will engage in to deny refunds. There are at least three *Davis* cases before the Court where states have denied refunds regardless of retroactivity. Georgia's *sua sponte* creation of a new procedure, the subject of the Petition for Certiorari, has been roundly criticized in The Journal of Multistate Taxation, Vol. 3, No. 3, May/June 1993, p. 84. South Carolina's post-*Davis* litigation precluding refunds is before this Court in *Bass v. South Carolina*, No. 91-1697. Arizona's judicial creation of an administrative remedy is pending in *Bohn v. Waddell*, No. 92-1748. In addition to these cases, the Court has before it *Northwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue*, No. 91-2047 and *Woosley v. California*, No. 92-1605. These non-*Davis* cases also involve the artful use of procedure to deny refunds of illegal taxes.

Although not yet before the Court, the charade taking place in the Wisconsin Tax Court is noteworthy for the direct and improper intervention of the Governor to influence the judicial process to deny refunds. *See Hogan v. Wis. Dept. of Revenue*, Wis. Tax App. Commission, Docket No. 91-I-386, Statement of Commissioner Douglas H. Bartley (April 8, 1993). This statement of recusal has not been reported yet, but previous developments in this case are reported at § 203-337 CCH Wis. Tax Rptr., 15,630 (1992).

STATEMENT OF THE CASE

Beginning in 1931, Georgia's income tax scheme provided exemptions for both federal and state retirees, 1931 Ga. Laws 24. These exemptions were soon repealed, and Georgia created patchwork exemptions for particular classes of state retirees over the next four decades. This practice culminated in 1980 when the various exemptions were consolidated in one statute to provide that virtually all retirement benefits paid by the State were exempt from state income taxation, O.C.G.A. § 48-7-27.

In Arkansas, the House recently passed HB 1827 (Ark. Gen. A/Reg. Sess. 1993) which provides that the state shall keep any illegal taxes collected before a court declares the tax illegal. This bill was defeated in the Arkansas Senate, but is expected to be reintroduced in the May session of the General Assembly.

In addition to this case and the two cited above from South Carolina and Arizona, there are five other *Davis* related cases pending: *Pledger v. Bosnick*, No. 91-375 (Ark.); *Harper v. Virginia Dept. of Taxation*, No. 91-794, *cert. granted*, 112 S.Ct. 1934 (1992); *Swanson v. North Carolina*, No. 91-1436; *Sheehy v. Montana Dept. of Revenue*, No. 91-1473; and *Duffy v. Wetzler*, No. 92-521 (New York). Since the *Harper* oral argument, Alabama has ordered refunds, and approximately $30 million in refunds are being issued. Oklahoma is officially stayed pending *Harper*; others appear to be unofficially stayed.

The states have clearly figured out that, after *McKesson* and *Beam*, the retroactivity game is up. *See* Harper Oral Argument Addresses Taxpayer Remedy, Tax Administrators News, December 1992 at 137. The new game for denying refunds of illegal taxes is "procedural bars." *Id.* at 144. A refund of illegal taxes is the only meaningful backward-looking relief available in these cases, but the states have served notice that they will pursue whatever mischief is necessary to prevent refunds.

No exemption was provided for federal retirees in the 1980 statute, and federal retirees protested this unequal treatment. In 1981, 1982, and 1983, bills were introduced in the Georgia House of Representatives to provide an exemption for federal retirees. These bills were not passed, and federal retirees were not afforded the income tax exemption received by state retirees.

In February 1985, a group of federal retirees filed a class action in U.S. District Court in Augusta challenging Georgia's taxing scheme and seeking refunds. The retirees asserted that the scheme violated 4 U.S.C. § 111 and the constitutional doctrines of intergovernmental immunity and equal protection. The Eleventh Circuit dismissed the retirees' action on jurisdictional grounds, holding that state procedural remedies were adequate even though a class action was not available against the State or its agency. *Waldron v. Collins,* 788 F.2d 736 (11th Cir. 1986).

During the 1980's Georgia experienced unprecedented economic growth. It was not a poor state starved for revenues. From 1985 to 1988, the State accumulated a revenue surplus of $193.4 million. During this period, the State has estimated that it collected $200 million in income tax from federal retirees. Thus, the revenue surplus was almost equal to the amount of taxes collected from federal retirees.[2]

---

[2] Several other states also enjoyed surpluses sufficient to offset refunds to retirees. These include Alabama, Arizona and Wisconsin. *See, Harper v. Va. Dept. of Taxation,* Case No. 91-794, Brief of *Amicus Curiae* on behalf of the military coalition in support of petitions, July 16, 1992, fn 16, pp. 18-19.

Shortly after *Davis* was decided in March 1989, thousands of Georgia retirees filed refund claims under Georgia's refund statute. As of March 1992, the State estimated its exposure for *Davis* refunds for 1985-88, the tax years covered under the statute, at $87 million (including interest). The State has revised this estimate twice downward from an original estimate of $250 million. Even if the new figure is correct and the State refunds it all, the State will still have profited immensely from the illegal tax.

After *Davis,* Cross-Respondent initially filed a direct action for refunds. That suit was dismissed because he failed to follow the procedure of the refund statute. He then filed a claim under the refund statute, and, after it was denied, Cross-Respondent initiated this action in the Superior Court of Clayton County, Georgia. The trial court denied Cross-Respondent's claim for refunds on the ground that *Davis* should not be applied retroactively under the analysis of *Chevron Oil v. Huson,* 404 U.S. 97 (1971).

The Georgia Supreme Court held that this Court's decision in *Jim Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis* because the taxpayer in *Davis* received the benefit of retroactive relief. This holding is the subject of the Cross-Petition for Certiorari filed by the State.

Although the Georgia court applied *Davis* retroactively, the court held that the refund statute did not apply, and that Colonel Reich had no remedy. This holding is the subject of the main Petition for Certiorari filed in this action.

ARGUMENT

I. RETROACTIVITY IS REQUIRED BY BEAM.

Where a state tax is found to be unconstitutional and is applied retroactively to the litigant in one case, that finding must also be applied retroactively to all other litigants not barred by procedural requirements or res judicata, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989), the taxpayer received retroactive relief in the form of a refund. The state in *Davis* conceded that a refund was appropriate because of the Michigan refund statute, and this Court held that the taxpayer was entitled to a refund under the authority of *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247, 52 S. Ct. 133, 136 (1931), *Davis*, 109 S. Ct. at 1508-1509. *Davis* remanded the case for consideration of the remedy, 109 S. Ct. 1509. Because the plaintiff in *Davis* received retroactive relief, Colonel Reich is entitled to retroactivity under *Beam*.

Beam references and cites *Davis* as having been applied retroactively, 111 S.Ct at 2445-446. When this Court remanded *Davis* for consideration of the remedy issue, it necessarily implied that *Davis* was to be given retroactive effect.

This is precisely what occurred in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984), where the Court remanded the case for consideration of the effect on the remedy of a "pass-through defense. This is what led the Court in *Beam* to conclude that *Bacchus* was applied retroactively: "Because the Court in *Bacchus*

remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided." *Beam*, 111 S. Ct. at 2445.

The State has argued that *Beam* does not apply in *Davis* litigation because the issue of retroactivity was not considered by the Supreme Court in *Davis*. According to this view, *Beam* would apply only if this Court had independently decided retroactivity in *Davis*. This identical argument was made and rejected by the plurality in *Beam*.

In *Beam*, the Court decided the taxpayer was entitled to retroactive relief because a similarly situated taxpayer had been granted retroactive relief in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984). In dissent, Justice O'Connor argued that *Bacchus* should not be applied retroactively because the *Bacchus* court did not analyze and decide the issue of retroactivity. She points out that *Bacchus* is silent on the retroactivity question:

> The *Bacchus* Court erred in applying its rule retroactively. It did not employ the *Chevron Oil* analysis, but should have. Had it done so, the Court would have concluded that the *Bacchus* rule should be applied prospectively only. Justice Souter today concludes that, even in the absence of an independent examination of retroactivity, once the Court applies a new rule retroactively to the parties before it, it must thereafter apply the rule retroactively to everyone.

(111 S. Ct. at 2451) (emphasis added).

The *Beam* plurality accepted this reading of its ruling, and it rejected the notion that an independent examination of retroactivity makes a difference. For the plurality, the issue was equal treatment:

> Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on the *Chevron Oil* analysis.

(111 S. Ct. at 2446).

To the *Beam* Court, whether or not *Bacchus* conducted an independent examination of retroactivity under *chevron* was "unnecessary to our ruling here." 111 S. Ct. at 2445, n. 2.

Beam says simply that a ruling applied to one litigant must be applied to future litigants. Whether there was a contested analysis of retroactivity in the underlying case is irrelevant. The *Beam* plurality made it clear that it doesn't matter **why** retroactive relief was granted. Thus, because the litigant in *Davis* received retroactive relief, Cross-Respondent is entitled to the same.

II. THERE IS NOTHING "NEW" ABOUT DAVIS.

Whatever analysis the Court applies, a purely prospective application of *Davis* requires a prior determination that *Davis* established a new principal of law. The facts in these cases simply cannot support such a finding.

4 U.S.C. § 111 has been law since 1939. The states make three basic arguments in claiming that *Davis* is new

law. First, the states claim that before *Davis*, 4 U.S.C. § 111 did not apply to retired compensation. This defies the plain reading of the statute and ignores several authorities, including *Zucker v. U.S.*, 758 F.2d 637, 639 (Fd. Cir.) *cert. denied*, 474 U.S. 842 (1985); and *Kizas v. Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983) *cert. denied*, 464 U.S. 1042; *Clark v. United States*, 691 F.2d 837 (7th Cir. 1982).

The states also claim that the "significant differences" test applied in *Davis* was a surprise, and that an equal protection test was the appropriate standard. This ignores the "significant differences" test clearly enunciated in *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. at 383, 80 S. Ct. at 479 (1960). Even the dissent in *Davis* conceded that, "Arguably the court's holding today is merely a logical extension of our decision in *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 80 S. Ct. 474 (1960) and *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 103 S. Ct. 692 (1983)." 489 U.S. at 803, 109 S. Ct. at 1512.

Moreover, any test or analysis, even "significant differences," is a *limitation* of 4 U.S.C. § 111, not an expansion. The purpose of *Chevron* and its progeny is to protect litigants from abrupt changes *expanding* liability. *American Trucking Co. v. Smith*, 110 S.Ct. at 2334. On its face, the protection provided by 4 U.S.C. § 111 is absolute and total. *Davis* certainly did not, indeed, could not, expand this protection. Thus, if *Davis* is "new," its only new in restricting the statute, and it cannot be used to invoke *Chevron*.

Finally, Georgia and other states claim that because 23 states engaged in this illegal taxation over a period of

years, this fact renders *Davis* new law. Under this view, the number of violators should be considered in determining whether a practice is illegal, and the larger the magnitude and the longer the violation, the greater the reason to avoid retroactivity. In other words, the rioting mob is right simply because it is a mob.

The more important question is whether any jurisdiction anywhere, at anytime, reasonably reached the legal conclusion that a tax exemption for state retirees was permissible under 4 U.S.C. § 111. The record is completely devoid of any such evidence. The states cannot point to a single case or statute that supports taxing federal retirees while exempting state retirees.

CONCLUSION

The fundamental problem with the state decisions in *Davis* cases is that they contribute to the erosion of the average citizen's respect for the law. These taxes clearly violated a federal law, and many states have statutes that plainly purport to require refunds. The irony is that the victims of these holdings are not average. By definition, they have served their country for more than twenty years, and many of them, including Col. Reich, risked their lives for democratic principles like the Rule of Law.

Moreover, these decisions make bad law, and they do not have the excuse of being hard. It did not require a constitutional scholar to warn Georgia's legislature that these taxes might violate 4 U.S.C. § 111, particularly after the state was sued on this ground in 1985. Nevertheless,

Georgia and other states persisted in this questionable taxation.

States should be required to scrupulously consider the statutory and constitutional rights of their citizens before taxing them. Special interests create powerful incentives for discriminatory taxation. Allowing a state to keep unconstitutional taxes provides a financial incentive to aggressively levy taxes even where there are doubts as to the legality of the tax. When a proposed tax is of questionable legality, states should be strongly encouraged to seek revenues in the broad expanse of constitutionally permissible taxation.

No legal purpose is served by allowing the states to keep these taxes. The states did not have the right to collect these taxes, and they should not have the right to keep them.

Respectfully submitted,

CARLTON M. HENSON
McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774